Supreme Court, U.S.
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No. 02-583

IN THE

Supreme Court of the United States

MATTHEW R. LIMON,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Kansas Court of Appeals

BRIEF IN OPPOSITION

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

8 pp

QUESTION PRESENTED

1. Does the Kansas "Romeo and Juliet" statute — which applies to consensual sodomy between a teenager who is 14-16 years of age and an "offender" who is less than 19 years of age — violate the Equal Protection Clause of the Fourteenth Amendment because it is limited to teenagers of the opposite sex?

2. Does it violate the jury trial rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the trial judge to increase an offender's sentence beyond the statutory maximum based on a prior juvenile adjudication?

3. Does the sentence in this case violate the Eighth Amendment's prohibition on cruel and unusual punishment?

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STATEMENT OF THE CASE

Kansas respectfully adopts the succinct statement of the case set forth in the opinion of the Kansas Court of Appeals in this case. *See* Appendix to Petition for a Writ of Certiorari ("Pet. App.") 4a - 6a

CERTIORARI CONSIDERATIONS

I. THIS COURT RECENTLY GRANTED REVIEW ON WHAT IS ESSENTIALLY THE SAME ISSUE RAISED IN THE FIRST QUESTION PRESENTED

The Court recently granted review of equal protection issues in a Texas case involving a criminal sodomy statute that treats heterosexual and homosexual sodomy differently. *See Lawrence v. Texas*, No. 02-102, *cert. granted*, 71 U.S.L.W. 3379 (Dec. 2, 2002).

Though the Kansas statute at issue here is narrower than the Texas statute in *Lawrence*[*]— the Kansas statute, Kan. Stat. Ann. § 21-3522, applies to reduce the punishment for heterosexual sodomy only in limited circumstances dependent on the ages of the two persons involved (the "victim" aged 14-16 and the "offender" under age 19) — it would not make sense to address the merits of the equal protection issue in this case until the Court has decided the Texas case.

Once the Court has decided *Lawrence v. Texas*, it may well be clear how the equal protection issue in this case should be resolved. Or the Court may, at that time, determine whether plenary review of the issue in this case is warranted.

Thus, in light of the Court's grant of *certiorari* in *Lawrence v. Texas*, and with respect for judicial economy, Kansas

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[*] The Texas statute challenged in *Lawrence*, Tex. Pen. Code § 21.06, makes it a misdemeanor for a person to engage "in deviate sexual intercourse with another individual of the same sex."

respectfully suggests that the Court hold the petition in this case until it decides *Lawrence*.

II. THE *APPRENDI* / PRIOR JUVENILE ADJUDICATION ISSUE IS CURRENTLY PENDING BEFORE THE COURT IN A KANSAS CASE IN WHICH THE COURT REQUESTED THE VIEWS OF THE UNITED STATES

The Court currently has pending a petition for a writ of *certiorari* in another Kansas case, *Hitt v. Kansas*, No. 01-10864, that raises the question whether prior juvenile adjudications are subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Apprendi* rule is that facts used to impose a sentence in excess of the statutory maximum must be determined by a jury. Because Petitioner's sentence in this case was so increased on the basis of a prior juvenile adjudication not proven to a jury, Petitioner raises the application of *Apprendi* to prior juvenile adjudications as the second Question Presented in this case.

In *Almandarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that prior adult criminal convictions need not be pleaded and proved to a jury for sentencing purposes. But *Apprendi* may have drawn that holding into question. At a minimum, lower courts have split on the question whether a "prior conviction" exception–assuming it is valid — should apply to prior *juvenile adjudications*. Compare *State v. Hitt*, 42 P.3d 732 (Kan. 2002) (prior juvenile adjudications need not be pleaded nor proven to the jury), *petition for cert. filed*, No. 01-10864 (June 13, 2002), and *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002) (same), *petition for cert. filed*, No. 02-6693 (Oct. 3, 2002), with *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) (prior juvenile adjudications must be pleaded and proved to a jury).

Thus, Kansas agrees with Petitioner that this issue merits plenary review by this Court, though that may well occur in

either *Hitt v. Kansas*, No. 01-10864, or *Smalley v. United States*, No. 02-6693, both of which are currently pending before the Court. Furthermore, Kansas respectfully reminds the Court that it requested the views of the Solicitor General in *Hitt v. Kansas* on October 21, 2002, and the Solicitor General filed briefs in both *Hitt* and *Smalley* on December 13, 2002.

Given that *Hitt* and *Smalley* are "ahead" of this case, Kansas respectfully requests that if the Court is to grant plenary review of this issue, it do so in the *Hitt* case, which presents only *Apprendi* issues and was decided by the Kansas Supreme Court, rather than the intermediate state court of appeals. If the Court grants review in either *Hitt* or *Smalley*, it should hold this case pending resolution of those cases. If the Court denies review in those cases, this case provides a far less suitable vehicle for review of the *Apprendi* / prior juvenile adjudication issue and should be denied.

III. THE EIGHTH AMENDMENT QUESTION HAS NOT BEEN PRESERVED FOR THIS COURT'S CONSIDERATION

With respect to the Eighth Amendment, the Kansas Court of Appeals in this case stated the following:

> This decision does not deal with any possible Eighth Amendment issues that might be generated by the much greater sentence since this involves a homosexual as opposed to heterosexual encounter. *This issue has not been raised.*

Pet. App. 14a (emphasis added).

Thus, any Eighth Amendment challenge has not been preserved for this Court's consideration. In fact, petitioner's suggestion that the lower court "rejected Petitioner's [Eighth Amendment] challenge without comment," Pet. 24, is misleading and incorrect. The Kansas Court of Appeals did not "reject" any Eighth Amendment challenge "without

comment"; rather, it declined to reach or consider any Eighth Amendment issues because it found that such issues had "not been raised." Pet. App. 14a.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court hold the petition with respect to the equal protection issue in light of the Court's recent grant of *certiorari* in *Lawrence v. Texas*, No. 02-102. Similarly, the Court may wish to hold the petition with respect to the *Apprendi* / prior juvenile adjudication issue if the Court grants review of that issue in another pending case, such as *Hitt v. Kansas*, No. 01-10864. But, in any event, the Eighth Amendment issue has not been preserved for the Court's consideration in this case

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

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